

**Disciplinary Panel
American Stock Exchange LLC**

IN THE MATTER
OF
SPEAR, LEEDS & KELLOGG, L.P.

:
:
Case No. 03-43a
:
Hearing Officer – JN
:
DISCIPLINARY PANEL DECISION
:
September 7, 2004
:

Digest

In accordance with a Stipulation of Facts and Consent to Penalty, the Disciplinary Panel determined that Respondent violated Exchange Rule 17a-4, as stipulated, and as a penalty, imposed a censure and a \$4,000 fine.

DECISION

I. Introduction

The American Stock Exchange, LLC (the “Exchange”) instituted a formal disciplinary proceeding against Spear, Leeds & Kellogg, L.P. (“SLK”), a Regular Member organization of the Exchange. A Disciplinary Panel held a hearing on August 26, 2004, pursuant to Exchange Rule 345(k), to review a Stipulation of Facts and Consent to Penalty (“Stipulation”) (attached as Exhibit A). The Exchange and SLK entered into that Stipulation for the purposes of settling this proceeding and concluding all disciplinary actions by the Exchange against SLK based upon or arising out of the facts set forth in the Stipulation.

II. Facts

SLK, without admitting or denying liability, stipulated to the facts set forth in the attached Stipulation. The Disciplinary Panel has determined to accept those facts for purposes of this Decision, and they are incorporated herein.

III. Violation

Based upon the stipulated facts, the Disciplinary Panel concludes that:

- 1.) SLK violated Rule 17a-4 of the Securities and Exchange Act of 1934 made applicable through Exchange Rule 324 in that the firm failed to maintain accurate books and records, as described in above paragraphs 2.3 through 2.11 of the Stipulation.

IV. Penalties and Publicity

The Stipulation proposes that the Disciplinary Panel impose upon SLK a censure and a \$4,000 fine. At the hearing, the Parties urged the Disciplinary Panel to accept the proposed penalty as being appropriate to the facts and circumstances of this case. After consideration of the Stipulation and the agreed-upon penalty, the Disciplinary Panel finds the proposed penalty is at the appropriate level to be imposed in this proceeding and therefore accepts the penalty proposed in the Stipulation.

The Disciplinary Panel further finds that the results of this disciplinary proceeding should be publicly disclosed, as provided in Rule 12 of the Exchange Rules on Disciplinary Proceedings.¹

V. Conclusion

Based on the foregoing, the Disciplinary Panel, by unanimous vote, accepts the Stipulation of Facts and Consent to Penalty and hereby imposes upon SLK a censure and a \$4,000 fine.

FOR THE DISCIPLINARY PANEL

Jerome Nelson, Chair

Dated: September 7, 2004

¹ Rule 12 exempts from publicity those cases where the Panel finds that the offense "related solely to minor administrative requirements of the Exchange and does not materially affect the public interest or the interest of investors." Those exemptions do not apply to the facts of this case.

Copies to: Christina A. Schulz, Esq. (*via facsimile and first class mail*)
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Arlene Collins-Day (*via first class mail*)

Disciplinary Panel
American Stock Exchange LLC

IN THE MATTER
OF
SPEAR, LEEDS & KELLOGG, L.P.

STIPULATION OF FACTS
AND
CONSENT TO PENALTY
Case No. 03-43a

This proceeding was instituted by the American Stock Exchange LLC (the “Exchange” or “AMEX”) against SPEAR, LEEDS & KELLOGG, L.P. (“SLK” or the “Firm”) (CRD # 3466), a Regular Member organization of the Exchange. This Stipulation of Facts and Consent to Penalty is entered into pursuant to Article V, Section 2 of the Exchange Constitution, in order to settle and conclude all disciplinary actions by the Exchange against SLK based upon or arising out of the facts hereinafter stipulated. SLK, without admitting or denying the facts, allegations and conclusions contained in this Stipulation of Facts and Consent to Penalty, hereby consents to the finding of violations of the Exchange Rules and to the imposition of the penalties hereinafter provided. SLK understands that this settlement is subject to approval by an Exchange Disciplinary Panel and the Amex Adjudicatory Council and that, if so approved, shall constitute a final decision which may not be appealed by the parties. SLK understands and acknowledges that the Disciplinary Panel’s decision in this matter will become part of SLK’s disciplinary record, and may be considered in any future proceeding brought by the Exchange.

STIPULATED FACTS:

1.1 At all times relevant herein, SLK was a Regular Member Organization of the Exchange.

1.2 During all relevant periods herein, Cohen, Duffy, McGowan & Co., LLC. (“CDM”) was a Regular Member organization of the Exchange.

1.3 During all relevant periods herein, CDM contracted with SLK to use SLK as its clearing firm for the exercise of expiring equity options, among other services. SLK received instructions and contrary instructions from CDM concerning the exercise of certain expiring equity options. CDM must submit contrary instructions to SLK for expiring equity options that would normally be exercised but that CDM determines not to exercise as well as for expiring equity options that would not normally be exercised but that CDM determines to exercise.

2.0 During all relevant periods herein, SLK was subject to Rule 17a-4 of the Securities and Exchange Act of 1934 made applicable through Exchange Rule 324 which provided that:

Members and member organizations shall keep true and complete books of account and records adequately setting forth the transactions of such members and member organizations in accordance with the requirements of the Constitution and rules of the Exchange and the Securities Exchange Act of 1934 and the rules thereunder.

2.1 During all relevant periods herein, Rule 980 provided that:

Final decisions by options holders to either exercise or not exercise expiring equity options must be made by members or member organizations not later than 5:30 P.M., New York time on the business day immediately prior to the expiration date (“the exercise cut-off time”). In this regard, members and member organizations must either (i) submit a Contrary Exercise Advice to the Exchange [or] (ii) take no action and

- allow exercise determinations to be made in accordance with OCC's Exercise-by-Exception procedure where applicable.
- 2.2 During all relevant periods herein, option AB was listed for trading on the Exchange.
 - 2.3 On March 21, 2003, prior to the 5:30 deadline, CDM submitted a written contrary instruction to exercise 185 March 35 call options in AB to SLK's Margin Department.
 - 2.4 SLK's Margin Department received CDM's written contrary instruction and, prior to the 5:30 deadline accepted the written contrary instruction to exercise 185 March 35 call options in AB.
 - 2.5 On March 21, 2003, at 5:36 p.m. Bloomberg reported a negative ruling by a Circuit Court judge against Company AB.
 - 2.6 As a result of the news report the stock price in Company AB, which closed at \$35.04 on March 21, 2003 declined over 2.5 points and opened lower at \$32.35 on the following Monday, March 24, 2003.
 - 2.7 Following the negative news report at 5:36 p.m. concerning Company AB, noted in paragraph 2.5 above, CDM decided to cancel its previously submitted written contrary instructions to exercise 185 March 35 call options in AB.
 - 2.8 After 5:36 p.m., CDM telephoned SLK's Margin Department and verbally instructed SLK's Margin Department to cancel the previously submitted written contrary instruction to exercise 185 March 35 call options in AB.

- 2.9 SLK accepted CDM's verbal instruction to cancel the previously submitted contrary instruction and therefore, on the basis of CDM's instructions, did not exercise the 185 March 35 call options in AB.¹
- 2.10 Pursuant to SLK's procedures at the time, receipt of a verbal cancellation request should have been noted on the contrary exercise instruction, and maintained by the firm. In this case, however, SLK was unable to produce to the Exchange the written contrary instruction received from CDM.
- 2.11 Consequently, SLK was unable to produce any record of CDM's original written contrary instruction for the exercise of 185 March 35 call options in AB or any record of CDM's cancellation of the previously submitted contrary instruction, thereby failing to maintain accurate books and records.
- 2.12 During the relevant time period, SLK had policies and procedures in place regarding the retention of records, including the records at issue, however those policies and procedures were not followed in this instance.
- 2.13 As a result of SLK's failure to maintain the contrary instruction as well as any documentation evidencing the cancellation of the contrary instruction, SLK Compliance Department personnel met with employees of SLK's Margin Department on April 23, 2003 to reinforce SLK's record retention policies. Additionally on August 6, 2003, management within SLK's Margin Department held a departmental meeting to review and reinforce SLK's record retention policies.

¹ CDM's failure to follow through on the previously submitted contrary instruction allowed CDM to avoid an unrealized loss of approximately \$50,000.

CONCLUSION:

By reason of the foregoing Stipulated Facts, an Exchange Disciplinary Panel may conclude that:

- 3.0 SLK violated Rule 17a-4 of the Securities and Exchange Act of 1934 made applicable through Exchange Rule 324 in that the firm failed to maintain accurate books and records, as described in above paragraphs 2.3 through 2.11.

DISCIPLINARY ACTION:

A Disciplinary Panel may impose the following penalties upon SLK:

- a) a censure, and
- b) a \$4,000 fine.

AMERICAN STOCK EXCHANGE

By: _____
David Rosenstein
Vice President and Chief Counsel

Agreed to this ____ day of _____, 2004.

Christina A. Schulz
Assistant General Counsel
Spear, Leeds & Kellogg, L.P.